

Muyenga v. Gonzales, No. 03-71982

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PREGERSON, Circuit Judge, dissenting:

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

I dissent. I disagree with the majority's conclusion that *Yeimane-Berhe v. Ashcroft*, 393 F.3d 907 (9th Cir. 2004), does not apply to the instant case. Because I believe that the principles underlying *Yeimane-Berhe* control this case, I conclude that the Immigration Judge ("IJ") improperly based his adverse credibility determination on the single fraudulent document submitted by the petitioner.

In *Yeimane-Berhe*, this court held that a single fraudulent document that goes to the heart of an asylum claim does not necessarily warrant an adverse credibility finding. *See Yeimane-Berhe*, 393 F.3d at 911. This is especially true "when there is no indication or finding by the IJ that the petitioner knew the document was fraudulent." *Id.* Therefore, while such a document may support an adverse credibility determination, it is not sufficient evidence, standing alone, that the petitioner lacks credibility. *See id.*

Yeimane-Berhe is persuasive here. There is little evidence that Muyenga "knew or should have known that the [newspaper article] was counterfeit." *See Yeimane-Berhe*, 393 F.3d at 912. Indeed, the IJ never concluded, nor does the

record suggest, that Muyenga knew the newspaper article was fake.¹ The IJ stated, “[T]he only thing I know about the case is that there is fraudulent evidence in there, therefore, I find the respondent not to be credible.” It was the document itself, and not Muyenga’s knowledge of its fraudulence, that served as the sole basis for the IJ’s adverse credibility determination. Applying *Yeimane-Berhe*, Muyenga’s testimony should have been viewed as credible by the IJ.

The majority claims that *Yeimane-Berhe* is distinguishable from this case. I disagree. First, the majority states that in *Yeimane-Berhe*, the petitioner’s witness visited her in prison and knew that Ethiopian government officials were looking for the petitioner. The majority goes on to say that in this case, Muyenga’s witness, Damiano Kigove, “did not observe [Muyenga’s] alleged capture and mistreatment.” It is simply incorrect to imply that Kigove did not observe any of the persecution suffered by Muyenga. The two men found each other while they were hiding in the jungle; both were trying to flee from the same military captors. They hid together in the bushes for a day while soldiers searched for them.

¹ At the hearing, Muyenga testified that when he first saw the article, he was suspicious; he acknowledged that he could see the different typefaces on the document. Muyenga explained, however, that in Uganda, stopping the presses and superimposing breaking news stories into newspapers is a common practice.

Together they escaped on foot to a nearby village. The allegation that Kigove had no personal knowledge of Muyenga's persecution has no basis in fact.²

Second, the majority states that in *Yeimane-Berhe*, the petitioner provided additional documents that helped to prove that the petitioner was persecuted. The majority contrasts the documentary evidence in *Yeimane-Berhe* with a letter Muyenga submitted as evidence. The letter, written by an official of the Uganda Young Democrats, provided additional corroboration for some of Muyenga's testimony. The majority essentially holds that this letter, unlike the additional evidence in *Yeimane-Berhe*, does little to enhance Muyenga's claim of persecution. But it is unnecessary to evaluate the relative strength or weakness of merely corroborative evidence. As the majority concedes, an applicant for asylum need not submit corroborating evidence. "Because asylum cases are inherently difficult to prove, an applicant may establish his case through his own testimony alone." *Garrovillas v. INS*, 156 F.3d 1010, 1016-17 (9th Cir. 1998); *see also* 8 C.F.R. § 1208.13(a) ("The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration."). Because Muyenga's

² The IJ speculated that the similarities between Muyenga's and Kigove's accounts suggested that the two men had "decided to make up a story and stick to it." The similarities in their stories, however, is not surprising because Muyenga and Kigove were kidnapped by the same military group. The two men had similar accounts because they went through the same experience.

testimony regarding persecution was consistent in “details relating to matters central to [his] claim.” *Yeimane-Berhe*, 393 F.3d at 912. The IJ could have based a finding of past persecution on his testimony alone.

Additionally, the majority points out that the IJ stated that Muyenga’s story was “not so inherently credible or consistent as to be certain he is telling the truth,” and that the newspaper article was “the one piece of evidence that would make [Muyenga’s] story completely unassailable.” The majority, however, omits a key concession by the IJ. After the IJ stated that Muyenga’s testimony was “not so inherently credible as to be certain he is telling the truth,” he went on to concede that, absent the fraudulent article, he was willing to give Muyenga “the benefit of the doubt” because there was no other reason to question his credibility. This suggests, then, that Muyenga *was* credible. Moreover, “complete unassailability” is not the standard for credibility in immigration court. It is well settled in this circuit that “an alien’s testimony, if unrefuted and credible, direct and specific, is sufficient to establish the facts testified without corroboration.” *Kaur v. Gonzales*, 379 F.3d 876, 890 (9th Cir. 2004).

According to the majority, the “most troubling flaw” in Muyenga’s case is the conflicting testimony he gave regarding how he came to possess the newspaper article. At one hearing, Muyenga said that he was present when the article was

brought to his apartment. In a later hearing, he stated that he was not. This discrepancy is overemphasized by the majority.³ The IJ did not think that this contradiction was worthy of discussion in his oral decision. The BIA also did not address the issue after its own review of the record. I believe the inconsistent testimony is simply not a significant matter on this review of the IJ's adverse credibility determination.

In sum, although Muyenga submitted a fraudulent document, he did not know or have reason to know that the document was falsified. Contrary to the majority's belief, there was no other reasonable basis for the IJ to conclude that Muyenga was not credible. Thus, under *Yeimane-Berhe*, it was improper for the IJ to base his adverse credibility determination on a single fraudulent document. Accordingly, I dissent.

³ The majority draws a parallel between this case and *Desta v. Ashcroft*, 365 F.3d 741 (9th Cir. 2004). That comparison is improper. In *Desta*, several fraudulent documents were accompanied by inconsistent testimony regarding the extent of the petitioner's injuries and the circumstances of an alleged rape. *See Desta*, 365 F.3d at 745. This court upheld the IJ's adverse credibility finding. *See id.* It is plain that in *Desta*, the problematic testimony related to subjects that went to the heart of the petitioner's claim. Here, the testimonial inconsistency related *only* to the fraudulent document, and *not* to the basic facts of Muyenga's asylum application.